

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090272
	:	TRIAL NO. B-0403268B
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
ROY WALLACE,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Roy Wallace presents on appeal three assignments of error that, when reduced to their essence, challenge the Hamilton County Common Pleas Court's judgment overruling his motion for a new trial without a hearing. We affirm the court's judgment upon our determination that the court had no jurisdiction to entertain the motion.

In March 2005, Wallace was convicted of murder and aggravated robbery. He unsuccessfully challenged his convictions in appeals to this court and to the Ohio Supreme Court.²

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² See *State v. Wallace* (May 31, 2006), 1st Dist. Nos. C-050266 and C-050281, motion for leave to file delayed appeal denied, 111 Ohio St.3d 1430, 2006-Ohio-5351, 855 N.E.2d 495.

In March 2009, Wallace filed a Crim.R. 33 motion seeking a new trial on the ground that his convictions were “void.” He argued that the state had violated his equal-protection rights by convicting him of felony murder in violation of R.C. 2903.02(B), instead of involuntary manslaughter in violation of R.C. 2903.04, because the statutes require identical proof, but the murder statute prescribes a greater penalty. And citing the supreme court’s 2008 decision in *State v. Colon*,³ he asserted that the aggravated-robbery count of his indictment had been defective because it had omitted the offense’s mens rea element. The trial court overruled the motion, and this appeal followed.

A Crim.R. 33 motion seeking a new trial on grounds other than newly discovered evidence may be filed either by right, within 14 days of the return of the verdict, or by leave of court, “within seven days from the order of the court finding [by clear and convincing proof] that [the movant had been] unavoidably prevented from filing such motion within the [14 days] provided.”⁴ A Crim.R. 33 motion filed within 14 days after the verdict’s return tolls the running of the 30-day period for filing a notice of appeal until the trial court overrules the motion.⁵

Wallace did not file his new-trial motion within the time prescribed by Crim.R. 33. His direct appeal from his convictions had divested the trial court of jurisdiction over his case, except to act in aid of the appeal or in a manner not inconsistent with our jurisdiction.⁶ Because we did not remand the case, the trial court did not regain jurisdiction after we had decided his appeal.⁷ And while a trial

³ 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

⁴ Crim.R. 33(B).

⁵ See App.R. 4(A) and 4(B)(3); Crim.R. 33(B).

⁶ *In re Kurtzhalz* (1943), 141 Ohio St. 432, 48 N.E.2d 657, paragraph two of the syllabus; accord *In re S.J.*, 106 Ohio St.3d 11, 2005-Ohio-3215, 829 N.E.2d 1207; *State ex rel. Special Prosecutors v. Judges* (1978), 55 Ohio St.2d 94, 97, 378 N.E.2d 162.

⁷ See *State ex rel. Special Prosecutors*, 55 Ohio St.2d at 97.

court retains jurisdiction to correct a void judgment,⁸ Wallace did not prove the alleged equal-protection violation⁹ or indictment defect that he insisted had rendered his convictions void.¹⁰

Thus, the common pleas court had no jurisdiction to entertain Wallace's motion. Therefore, the motion was subject to dismissal on that basis,¹¹ and the court cannot be said to have abused its discretion in declining to conduct a hearing on the motion.¹²

Accordingly, we overrule the assignments of error. And upon the authority conferred by App.R. 12(A)(1)(a), we modify the judgment appealed from to reflect a dismissal of the motion, and we affirm the judgment as modified.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on May 26, 2010

per order of the Court _____.
Presiding Judge

⁸ See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶18-19.

⁹ See *United States v. Batchelder* (1979), 442 U.S. 114, 99 S.Ct. 2198 (holding that defendant must demonstrate that the state discriminated against defendant's class based on an "unjustifiable standard"); *State v. Brundage*, 1st Dist. No. C-030632, 2004-Ohio-6436, appeal not accepted for review, 105 Ohio St.3d 1472, 2005-Ohio-1186, 824 N.E.2d 542 (holding that involuntary manslaughter is a lesser-included offense of felony murder); accord *State v. Herron*, 2nd Dist. No. 22451, 2008-Ohio-5362, appeal not accepted for review, 121 Ohio St.3d 1426, 2009-Ohio-1296; *State v. Ford*, 10th Dist. No. 07AP-803, 2008-Ohio-4373, appeal not accepted for review, 120 Ohio St.3d 1506, 2009-Ohio-361, 900 N.E.2d 623; *State v. Jones*, 8th Dist. No. 80737, 2002-Ohio-6045, appeal not accepted for review, 98 Ohio St.3d 1513, 2003-Ohio-1572, 786 N.E.2d 63.

¹⁰ See *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038 (holding that an indictment for aggravated robbery in violation of R.C. 2911.01[A][1] was not defective because the statute imposes strict liability for the element of brandishing, displaying, using, or indicating possession of a deadly weapon).

¹¹ See *State v. Lemker* (Mar. 23, 2001), 1st Dist. No. C-990331.

¹² See *State v. Howard* (June 25, 1986), 1st Dist. No. C-850755.